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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1588

CAROL VANCE, et al.,
Appellants,

vs.

UNIVERSAL AMUSEMENT CO., INC., et al.,
Appellees.

GEORGE E. McCREA, et al.,
Appellants,

vs.

KING ARTS THEATRE, INC.,
Appellee.

MOTION TO AFFIRM OR DISMISS

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Pursuant to Paragraph 1(c) of Rule 16 of the Revised Rules of this Court, Appellee moves that the judgment of the Court of Appeals be affirmed on the ground that it is manifest that the questions on which the decision of the cause depend are so unsubstantial as not to need further argument. Appellee further moves pursuant to Paragraph 1(a) of Rule 16 that the appeal be dismissed on the ground that it was not taken in conformity to these rules. Appellees specifically state that the Appellants do not set forth in their jurisdictional statement the questions presented by the appeal as required by Rule 15.

OPINIONS BELOW

This cause was originally heard by a three-judge district court reported at 404 F.Supp. 33. The State of Texas on behalf of the Appellants appealed to The United States Court of Appeals for the Fifth Circuit which rendered an opinion reported at 559 F.2d 1286. A Petition for Rehearing En Banc was filed. The Court granted the rehearing en banc and rendered its opinion on December 18, 1978, which is reported at 587 F.2d 159.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The jurisdictional statement of Appellants does not state the jurisdictional grounds. Notice of appeal, however, was filed indicating that Appellants rely upon 28 U.S.C. § 1254(2).

PRELIMINARY STATEMENT

The Appellant's preliminary statement is not entirely correct. The opinion in the district court indicates that a number of cases (approximately 17) were consolidated in that each challenged similar Texas statutes involving obscenity proceedings or the use of nuisance proceedings in an obscenity situation. As stated in the District Court opinion, the managing Judge, in an effort to simplify the process of deciding all of the varied cases, chose three of the cases which presented the least jurisdictional problems and also presented straightforwardly at least one of the challenges brought on by each of the remaining cases. The three cases were tried upon a stipulation of facts set forth in pre-trial orders which also specified the issues. Two of the three cases decided by the District Court were

appealed, which were this cause by the State of Texas and *Butler v. Dexter,* by the District Attorney's office of Bexar County and the City of San Antonio. The appeal of the *Butler* case did not involve Article 4667(a)(3) as stated in the jurisdictional statement, but involved bad faith of the City of San Antonio and the District Attorney's office of Bexar County in the use of a criminal instrument statute found in § 16.01 of the Texas Penal Code to charge that motion picture operators using an ordinary movie projector and showing films with a felony of using a criminal instrument. The felony charge was used in bad faith even though the showing of an obscene movie was a Class B misdemeanor in Texas.

QUESTIONS PRESENTED

The Appellants set forth no questions presented by their appeal. The Appellants, however, attempt to discuss three reasons why their appeal is substantial and the questions may be constructed from their discussion.

Appellee, however, not only believes that the questions are insubstantial but that Appellants do not comply with Rule 15 in setting forth the questions presented by the Appeal which might be considered by the Court.

The following appear to be the questions which are insubstantial.

1. Was the Court of Appeals correct in finding that the Texas statutes lacked procedural safeguards for issuance of an injunction prohibiting exhibition of obscene material past and future?

2. Was the Court of Appeals correct in holding Article 4667 (a)(3) of the Texas statutes unconstitutional insofar as it authorizes injunctions against future exhibition of unnamed motion picture films?

3. Was the Court of Appeals in error in holding that the Appellee as a prevailing party is entitled to attorney's fee under the Attorney's Fee Award Act of 1976, which amended 42 U.S.C. §1988 to permit awards of attorney fees for suits brought under the Civil Rights Acts?

STATEMENT OF THE CASE

King Arts Theater, Inc. was operating a motion picture theater in San Angelo, Texas. The Appellant, George E. McCrea, County Attorney, contacted the landlord to request the lease be cancelled and to advise the landlord that an injunction suit charging the theater was a nuisance would be filed under the appropriate Texas statutes. The County Attorney intended for the injunction to abate the theater as a public nuisance in order to prohibit the future showing of allegedly obscene motion pictures. The Appellee, King Arts Theater, filed suit requesting a declaratory judgment and injunctive relief. By agreement, the parties determined the status quo would be maintained until determination of the cause.

At the pre-trial hearing in August, 1974, the King Arts Theater case was selected as a classic case clearly setting forth issues that were raised not only by it but other consolidated cases. That portion of the pre-trial hearing indicating the process of selection, the cooperation of the attorney for the State of Texas and the agreement of the parties are set forth in Appendix A.

Mr. Zwiener and Mr. Flusche from the office of the Attorney General of the State of Texas represented the appellants. Mr. Zwiener also represented the State of Texas in a number of the other cases then before the Court in the pre-trial hearing. The Attorney General's office cooperated with the Court in the selection of three cases which set forth the several statutes being attacked in the various cases and drafted a general injunctive order concerning some of the other cases. The Court had originally requested the hearing in order to attempt to learn all of the issues and to decide what, if any, hearings were necessary to determine facts by single judge prior to the convening of the three judge court. It developed during the course of the proceeding that the managing judge selected three of the cases which presented the straightforward issues and all counsel cooperated in stipulating facts and issues. While the Court restrained future harassment and arrest, the District Court did not restrain the trial of any criminal actions pending.

The stipulations and pre-trial orders were entered, briefs prepared and the three judge District Court rendered its decision.

The decision by the District Court involving *Ellwest Stereo Theater, Inc. v. Byrd* from Dallas was not appealed by officials in Dallas or the State Attorney General's office. The Court declared a portion of the Texas statute on search warrants unconstitutional and held that its use in the seizure of equipment and materials such as motion picture projectors and other equipment was improper and ordered such material returned.

The City of San Antonio and the District Attorney's Office of Bexar County appealed the *Dexter* case, but no other party, including the State of Texas joined in.

The State of Texas appealed the provision involving nuisance but no one representing parties in the other cases intervened or attempted to intervene in the appeals to the United States Court of Appeals for the Fifth Circuit.

The pre-trial hearing, as shown in Appendix A, clearly shows that the Court was attempting to litigate in a clear, straightforward matter the issues presented by the number of these cases which had been consolidated. The State of Texas cooperated

in this effort and did not object. In fact, the state indicated the King Arts case clearly involved the constitutionality of the nuisance statute.

The Court of Appeals for the Fifth Circuit sitting en banc determined that the only issue on appeal was the constitutionality of the Texas nuisance statutes as applied to obscenity. The Court determined that Article 4666, which permitted a one-year closing remedy of a nuisance was inapplicable to obscenity. The State of Texas did not appeal this issue to The United States Supreme Court.

The Court of Appeals further determined that article 4667 (a)(3) was unconstitutional insofar as it authorized injunctions against the future exhibition of unnamed films. Such a broad injunction could not stand and amounted to a prior restraint. The Court of Appeals further found that the Texas nuisance statute authorizing an injunction against commercial exhibition of obscene material lacked procedural safeguards. Finally, the Court of Appeals found that King Arts Theater was a prevailing party and remanded the cause to the District Judge to award fees to the attorney for King Arts pursuant to the Civil Rights Attorney's Fees Award Act of 1976.

THE COURT OF APPEALS WAS CORRECT IN FINDING THAT THE TEXAS STATUTES LACKED PROCEDURAL SAFEGUARDS FOR ISSUANCE OF INJUNCTIONS AGAINST COMMERCIAL OBSCENITY AND NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

The Court of Appeals found the following:

1. The Texas injunction procedures treat obscenity no different than any other civil action.

2. A temporary restraining order without notice and ex parte may be issued under the Texas Rules of Civil Procdure.

3. A preliminary injunction may be issued upon probable right which cannot be reversed on appeal unless there is an abuse of discretion. The Texas procedures are from the federal rules for obtaining injunctions.

4. Once a temporary injunction is issued there is no procedure for obtaining any prompt hearing upon the merits.

5. There is no provision for a prompt decision after a hearing on the merits is finally reached.

The Court of Appeals found that the Texas statutes did not conform with the requirements set forth by decisions of this Court including the model for such injunction procedures set forth in *Kingsley Brooks v. Brown*, 354 U.S. 436.

The appellee contends that the Court of Appeals is imminently correct that neither Article 4667 nor the Texas Rules of Civil Procedure provide procedural safeguards necessary to insure due process of law when dealing with materials presumptively protected by the First Amendment. Appellee agrees with the reasons set forth by the Court of Appeals that the Texas statutes have no procedural safeguards for the following reasons:

1. There is no provision for notice prior to the issuance of a temporary injunction.

2. After the issuance of a temporary injunction, there is no provision for a prompt hearing.

3. There is no provision for a prompt judicial determination after the hearing on the merits.

This Court has discussed this proposition and the Court of Appeals for the Fifth Circuit properly applied the reasons set forth by this Court in *Freedman v. Maryland*, 380 U.S. 51;

Blount v. Rizzi, 400 U.S. 410, 91 S.Ct. 423; and *U.S. v. Thirty-Seven Photographs*, 402 U.S. 363, 91 S.Ct. 1400.

In *Blount v. Rizzi, supra*, this Court determined there was a need for a provision for a prompt hearing and a prompt judicial determination. A statute detaining mail was held unconstitutional. This Court held the procedures in the federal statute violated the First Amendment unless they included *built-in safeguards*. The Court declined to interpret the statute and refused to rewrite the act of Congress. On the other hand, this Court determined from the legislative history that it could construe the statute in *U.S. v. Thirty-Seven Photographs, supra* and authoritatively determined the time limit for beginning proceedings and for the hearing and determination. This Court explained that it could not construe the state statutes in *Freedman v. Maryland, supra*, or *Teitel Film Corporation v. Cusack*, 390 U.S. 139 because there were *state statutes* and the Court lacked jurisdiction authoritatively to construe state legislation. This Court has also pointed out many times that the procedures considered in *Kingsley Books, Inc. v. Brown, supra*, provide a model for the injunctive procedure. The New York statute provided a hearing one day after joinder of issue and a decision by the judge within two days after termination of the hearing. There was no injunctive relief until there had been a judicial determination of obscenity following notice and an adversary hearing.

The appellants in this cause cite no authority and raise no substantial question. Neither Article 4667(a)(3) nor the Texas Rules of Civil Procedure have any procedural safeguards built in nor do any of the cases cited by the appellants indicate any construction by the highest court of Texas writing in procedural safeguards for a prompt hearing and a prompt decision or for a proper notice and adversary hearing prior to the issuance of the temporary injunction. There is no substantial federal question raised concerning procedural safeguards for this Court to consider.

The appellants attempt to state that all of the courts of Texas will issue carefully worded injunctions which will have procedural safeguards built in. There is still no assurance that any Texas state court will require notice and adversary hearing or change any procedural rules nor provide for a prompt judicial hearing.

In addition, the State of Texas cannot assure that injunctions will be granted that will properly enjoin future unnamed allegedly obscene films and such an injunction is a prior restraint. An example of such an injunction issued by a state court in Dallas while this case was pending on appeal with the Fifth Circuit which violating the assurances of the State of Texas set forth in the Jurisdictional Statement is attached as Appendix "B" to this brief.

THERE IS NO SUBSTANTIAL FEDERAL QUESTION AND THE COURT OF APPEALS WAS CORRECT IN HOLDING TEXAS STATUTE ARTICLE 4667(a) (3) UNCONSTITUTIONAL INSOFAR AS IT AUTHORIZES INJUNCTIONS AGAINST FUTURE EXHIBITION OF UNNAMED FILMS

The Court of Appeals found that the Texas decisions allow issuance of an injunction against the future exhibition of unnamed films that depict particular acts enumerated in the state's obscenity statute. The court found that such an injunction cannot stand for it amounts to a prior restraint on materials not yet declared obscene. The court found that a film containing many of the acts listed in the statute may eventually be held not to be obscene since the work must be taken as a whole and since state law cannot define the contemporary community standards that must be applied by the fact finder. *Smith v. United States*, 431 U.S. 291, 97 S.Ct. 1756. In addition the Court of Appeals found that an injunction forbidding

the showing of any film portraying particular acts enumerated in the obscenity statute suppresses future films because past films have been deemed offensive. The court further found that such an injunction by interweaving language from the obscenity statute merely begs the question by making an advance judicial determination that any film containing such acts must be obscene. The State of Texas in the jurisdictional statement attempts to state that such an injunction as was issued in Austin, Texas and set forth in the appendix to its brief meets any constitutional objections. The injunction issued in Dallas attached as Exhibit "B" to this brief, long after the Austin injunction, clearly shows the inconsistent applications in the State of Texas by its lower courts. The State of Texas attempts to rely upon *Richards v. State*, 497 S.W.2d 77, which said that if its action in attempting to say that films which portray explicit sexual manners are automatically obscene and could be so identified in an injunction against future films was not correct that the court was an *intermediate* court and it would conform to that of overriding authority when required to do so.

The decision of the Court of Appeals is correct and follows the holding of many decisions finding an injunction against future unnamed films is a prior restraint. See *Parish of Jefferson v. Bayou Landing, Ltd.*, 350 S.2d 158 (La. 1977); *News Mart, Inc. v. State ex rel. Webster*, 561 S.W.2d 752 (Tenn. 1978); *Ranck v. Bonal Enterprises, Inc.*, 467 Pa. 569, 359 A.2d 748 (Pa. 1976); *Fehlhaber v. North Carolina*, 445 F. Supp. 130 (E.D. N.C. 1978); *Busch v. Projection Room Theatre*, 550 P.2d 600, *cert. denied*, 429 U.S. 922; *General Corp. v. State ex rel. Sweeton*, 320 S.2d 668 (Ala. 1975), *cert. denied*, 425 U.S. 904.

There is no conflict between this decision and decisions cited by the State of Texas such as *Near v. Minnesota*, 283 U.S. 697 (1931); *Kingsley Books v. Brown*, 354 U.S. 436 (1957), or

Southeast Promotions, Ltd. v. Conrad, 420 U.S. 546. In fact, the decision by the Court of Appeals is consistent with those decisions by this Court which would require procedural safeguards. It would be an easy way for this Court to control obscenity if a court could merely state you may not show sexual intercourse in a film. It would be equally invalid to provide in the injunction that you may not show sexual intercourse in a film provided that such conduct appeals to prurient interests and is without any serious value.

Such an injunction against future unnamed films is overbroad and a prior restraint. The decision of the Court of Appeals is correct and further does not present any substantial federal question for this Court to consider.

THE AWARD OF ATTORNEY'S FEES RAISES NO SUBSTANTIAL QUESTION

The Appellants in their jurisdictional statement, makes an unwarranted conclusion that the awarding of attorney's fees raises substantial questions of fact and law and refers to the fact that a number of cases were consolidated.

The State of Texas was a defendant in this cause and represented defendants in a number of cases. It is completely illogical for the State to imply that the County Attorney would have attorney's fees levied against him for a multitude of cases. King Arts Theatre is entitled to fees for its attorney for issues raised by this case to be awarded against either the State of Texas or the County. The District Court judge may and probably will levy fees against the State of Texas. The State of Texas appealed and represented the parties and wanted the issues litigated. As shown by the Appendix setting forth the pre-trial hearing, the State of Texas was interested in many cases. No parties in this cause were forced into areas of litigation not originally contemplated. This original suit for declaratory judgment raised the

issue of the use of a nuisance statute to enjoin future unnamed films and that procedural safeguards are lacking. This is exactly the finding of the Court of Appeals in this decision.

This Court has determined that attorney's fees may be awarded to the prevailing party under the Civil Rights Attorney's Fees Awards Act of 1976, codified in 42 U.S.C. §1988. The Court in *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, specifically held that fees may be awarded to the prevailing party even against the state. The Court made clear that the legislative history of the act provides that attorney's fees may be obtained either directly from the official in his official capacity, from funds of his agency or under his control or from the state or local government whether or not the agency or government is a named party. In this cause, not only the County Attorney, but the Attorney General of the State of Texas and the Governor of the State of Texas were likewise made parties. The Attorney General defended the constitutionality of the acts of the State of Texas. The Court this term in *Quern v. Jordan*, — U.S. —, 99 S.Ct. 1139, stated that it was held in *Hutto v. Finney* that in enacting the Civil Rights Attorney's Fees Award Act of 1976, Congress intended to override the Eleventh Amendment immunity of the states and authorize fee award payments by the states when their officials are sued in their official capacity.

It is inconceivable to say there is a substantial question arising as to the determination of the award of fees to counsel for King Arts Theatre, Inc. against the State of Texas or the County Attorney, because there were other pending cases which were not thereafter tried, nor could there be any claim for attorney's fees in this cause for other cases. All of those cases were remanded back to the single judge court and so far as is known, none were appealed (see 404 F.Supp. at 47). Each of these cases would stand on its own merits for any attorney's fee award.

The District Court and the Court of Appeals, by litigating this one case saved substantial time and effort on the part of

the State of Texas in defending a number of cases. There is no Federal question, and certainly no substantial question that this Court should consider which would reverse the holding that the attorneys for King Arts Theatre are entitled to an award of attorney's fees as the prevailing party.

CONCLUSION

For the foregoing reasons, we respectfully submit that the questions presented by appellants are clearly insubstantial and the judgment of the Court of Appeals should be affirmed.

FRIERSON M. GRAVES, JR.,
Attorney for Appellee

APPENDIX.

APPENDIX A

Pre-Trial Hearing

[17]* PROCEEDINGS

THE COURT: Please be seated, Gentlemen. Good morning.

I am not at all sure, quite frankly, that I, as the Court or the Managing Judge, know anything more about this matter than any one of you, probably less.

The reason for bringing you lawyers down here from out of town is that we had a three-judge court case called Universal Amusement versus Carol Vance. It involved Deep Throat. A three-judge court was constituted by Judge Brown, consisting of Judges Ingraham, Taylor and myself.

* * * * * * *

[18] And it involved a claim of unconstitutionality of the Texas Penal Code as it then existed as it related to obscenity, lewdness, et cetera.

About the same time, a case arose out of Dallas and Judge Brown thought he ought to consolidate that case with our [19] case. And since then, Judge Brown—every time any of my fellow judges anyplace in Texas has one of these cases, they ask for a three-judge court and that it be consolidated into our case. And Judge Brown—well, actually, they did not originally ask to be consolidated. That was Judge Brown's idea.

So now we have, according to our records—and as I understand, part of the delay this morning was trying to find out who all the lawyers were and what happens, our records reflect one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve —thirteen cases including the original case, Judge Brown has consolidated.

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* Numbers appearing in brackets in text indicate page numbers of original stenographic transcript of testimony.

I understand from my law clerk now some of you have other cases that we don't know whether they have been consolidated into our case or whether they have not.

But I know of no way to get this show on the road other than for me to do what I have done today and that is have all you lawyers down here in each of the cases that I know anything about, and if there are other cases that you know about that I do not know **[20]** about that have been consolidated, I would like to know about those. I would like for you to stand up and tell me what your case involves. If it is a movie, what movie is involved; if there are pending criminal prosecutions in your case or whether it is a civil matter or a criminal matter; whether or not it involves—as I understand it, some of these may involve books and not movies. And what parts of the penal code are involved in your case and what, basically, the contentions are.

I would like to have you do that and then I would like to have —I want to have Yvette transcribe all this and I would like for all of you—not just because of the money situation, which has nothing to do with it—but I would like for all of you to order copies. And then after I have been able to get this and have it transcribed, send a copy to Judge Taylor and a copy to Judge Ingraham. I can then convene or ask to be convened the three-judge court—or not convened, but ask for a meeting—and we can discuss to see where we are going. I don't know what else to do. We've got to get this show on the road.

* * * * * * * *

[39] MR. ZWIENER: Your Honor, there is one general thing, one general observation, that I would like to make with regard to all these cases and the three-judge panel meeting. And I am not sure that my colleagues, the district attorneys and the city attorneys throughout the state, completely endorse what I am going to say and they may want to differ with me, but the Court of Criminal Appeals of Texas, for some years I thought was doing a good job of interpreting the Texas obscenity statute so

as to include within its proscription only hard core pornography, obscenity.

* * *

[41] I take the position that they will return to their old specificity and we will have a statute as interpreted that will comport with Miller v. California. But we will ask that the three-judge court hearing be put off sometime until October. In the cases that I'm in, if there are injunctions against the state proceeding, I have no objection to that.

THE COURT: I don't think you have a thing to worry about there. I don't **[42]** believe there is any way under the sun that we can get any sort of a hearing with this tthree-judge court before October.

MR. ZWIENER: Thank you, Your Honor.

THE COURT: Hopefully, we can get it this year.

MR. ZWIENER: Thank you, Your Honor. As I say, I'm not sure that my fellow cohorts, the district city attorneys that are here, agree with my remarks, but I would of course prefer to make my argument to the three-judge panel after the Court of Criminal Appeals has hopefully come out with a new and more specific decision.

THE COURT: I don't mind saying that what I have ultimately in my mind, if it is at all practical—and I don't know whether it is practical or not, and I guess we will decide after I hear from all you attorneys—if we could get this case in some sort of a consolidated posture to where we could or you could select one or two attorneys from each side that could represent the whole consolidated case and we could just have a hearing and listen **[43]** everything or almost everything.

THE COURT: But I know the feeling of Judge Ingraham on these three-judge court cases. He doesn't want to have—he wants the managing judge to hold all the factual hearings if the

attorneys can't stipulate. He does not—he prefers not to have any hearings, factual hearings, on a three-judge court case.

* * *

[149] THE COURT: All right. How about this Tom Green County case?

MR. GRAVES: Your Honor, please, I think we have the classic case.

THE COURT: That's Judge Woodward's?

MR. GRAVES: Yes, sir. In this case there is no pending criminal prosecution. There is no pending civil prosecution. There was a threat of bringing a nuisance suit, which in the answer was more or less admitted. They had requested the landlord to cancel the lease or, if not, that they would then proceed with a nuisance suit against the King Arts Theatre.

So we have in this case the nuisance statute for determination and the use of the obscenity definition in the nuisance **[150]** statute, so it raises the issue of whether the obscenity definition is constitutional.

THE COURT: Who represents the defendants in this case?

MR. FLUSCHE: I do, Your Honor, Max Flusche from the Attorney General's office.

THE COURT: The Attorney General's office represents all the defendants in this case, does it not?

MR. FLUSCHE: In King Arts?

THE COURT: Yes, sir.

MR. FLUSCHE: Yes, sir.

THE COURT: Out of Tom Green County?

MR. FLUSCHE: Yes, sir.

THE COURT: Yes.

MR. FLUSCHE: I think Mr. Graves has correctly stated the issues in this case. It's pretty clean cut and it involves the constitutionality of the obscenity statute and the constitutionality of the nuisance statute and the question of whether or not the nuisance statute can utilize the definition of obscenity that is contained in the obscenity statute.

There is no question of bad faith **[151]** harassment here. I believe you state that there was no bad faith harassment——

MR. GRAVES: No.

MR. FLUSCHE: ——there is no pending criminal or civil prosecution, and it is——

THE COURT: Why don't we just enjoin everything else and just take this case and just let all the rest of these cases tag along?

MR. GRAVES: Your Honor, I'd be glad——

THE COURT: Just issue some sort of an injunction enjoining any other proceedings in any of the rest of these cases pending the determination of your case? Isn't this the cleanest case we have?

MR. GRAVES: Yes, sir, I think it is. I've looked at all of them. This is the cleanest one, with just threatened prosecution.

MR. KAUFMAN: Respectfully, Your Honor, in reference to old Article 527, I don't believe this case takes that into account unless you would like to throw it in the same **[152]** ball of wax, because we do have some attacks on 527 outstanding in our cases.

MR. GRAVES: It's in there, too.

MR. FLUSCHE: It is, too.

THE COURT: Is the search and seizure under the new——

MR. GRAVES: No, sir. No search and seizure.

MR. FLUSCHE: No search and seizure.

THE COURT: Is the new criminal instrument statute?

MR. GRAVES: No, sir. We will need the search and seizure and the criminal instruments, and the Dexter case is pretty good from San Antonio.

MR. ARANSON: I was going to comment that Mr. Ausburn's case on the criminal instrumentality, 16.01, is almost classic. And then we've got the case involving 18.02, which is that Fort Worth Ellwest case. That is pretty classic.

THE COURT: What you're saying is I could take those three cases, hold all the rest of them in abeyance——

[153] MR. AUSBURN: Right.

THE COURT: ——and just proceed on those three cases? Is that what you are saying?

MR. ARANSON: I believe we can, Your Honor, providing we don't have any threshhold questions again. As I said before, it would seem that the Mitchum v. Foster approach would preclude that.

THE COURT: You make a very—it's very appealing for me to do something that cuts through some sort of—cuts this down some way, because I get—I think all the judges would just end up getting confused and chasing more rabbits than we would like to chase in these cases if we do not do something along this line.

I had not thought about it, but I know—I've talked to Judge Woodward over the telephone about his case and I did know that it is his feeling that it represents a rather classic situation, to clear the air on this matter. So if we took——

MR. FLUSCHE: Of course, Your Honor, let me say this, that the factual basis **[154]** for the issuance of an injunction case in King Arts Theatre may be not as compelling as it is or not as strong as it is in other cases.

THE COURT: Well, you all have an agreement up there, do you not, that everything can just stay like it is?

MR. GRAVES: Yes, sir. They filed no injunction proceedings.

THE COURT: As I understand from Judge Woodward everybody just had an agreement that everything would stay like it is and there would be no injunction issued or anything until we could get the matter resolved in this three-judge court.

* * *

[158] THE COURT: Yes. Okay. So as to the King Arts v. McCrea, I could take and get you gentlemen to prepare what we use here in this Court and in Judge Seale's and in Judge Bue's. We have a common pretrial procedure and a pretrial order. I could give you the **[159]** form for that, get you to fill it out. It contains the stipulated facts, and so on and so forth.

We could do that in your case and reach the constitutional problems involved, right?

MR. GRAVES: Yes, sir.

THE COURT: Then you think I ought to take one of those—one of the Dallas cases?

MR. ARANSON: Your Honor, we have that old Section 13 case which we have, you know, the order for injunction on that may deal in some way with this case.

THE COURT: They seem to think that it would.

MR. ZWIENER: Your Honor, the Section 13, which is injunction proceeding, is a new nuisance statute which is also an injunction proceeding. It has the same constitutional questions, prior restraint, doesn't it?

* * *

[167] THE COURT: Let's just take the King Arts case. Could you gentlemen in the King Arts give us—that is, the three judges—an agreed statement of the case?

MR. GRAVES: I think we could.

MR. FLUSCHE: I believe so, Your Honor.

[168] THE COURT: And a stipulation as to the facts?

MR. GRAVES: Yes, sir.

MR. FLUSCHE: I'm sure we can.

THE COURT: Enumerate the legal issues involved?

MR. GRAVES: Yes.

THE COURT: And the statutes obviously involved?

MR. GRAVES: Yes, sir.

THE COURT: That would be in the enumeration.

File briefs. Anybody in any of the other cases could file an amicus brief.

Okay? Can we proceed that way in your case?

MR. GRAVES: Yes, sir.

MR. ZWIENER: Your Honor, the only thing that occurs to me is they don't have an order to their case, an injunction enjoining future showings, which we do.

THE COURT: Judge Woodward tells me that that's no problem. They have all entered into some sort of agreement that they are going to preserve the status quo.

[169] MR. ZWIENER: What I really referred to is an injunction against the theater from showing obscene materials and whether or not it's carefully drawn. How are you going to solve that problem in your case?

MR. GRAVES: I think the legal issue is prior restraint; can they issue an injunction that says you won't show in the future, quote, obscene film, unquote.

* * *

[198] THE COURT: Could anybody else give me an agreed—write me some sort of a temporary injunction that would be agreed to by everybody?

MR. GRAVES: Your Honor, may I suggest Mr. Flusche or Mr. Zwiener, that they seem to be in all the cases and I've found them very reasonable people, supply reasonable **[199]** answers?

THE COURT: Will you all do that?

MR. COIL: May it please the Court, I'll be happy to join another lawyer to write the order.

THE COURT: Mr. Zwiener, you and Mr. Flusche, can't you all give me some sort of an order?

MR. ZWIENER: Yes, sir, we will, Your Honor, under the condition, of course, that I may turn around and address my fellows here and say that I'm doing it under the instructions of the Court.

THE COURT: Okay. You are.

* * *

[200] MR. ZWIENER: I am familiar with the case. Leave that out. Of course, this Austin Book Store case, we are under an injunction, too, I believe, Your Honor.

THE COURT: Right. But as I understand—now, that case, you all sort of agreed to it, haven't you? Can't you operate under an agreed order?

MR. ZWIENER: Yes, sir.

APPENDIX B

No. 78-2055-C

Henry Wade, District Attorney of Dallas County, Texas and Lee E. Holt, City Attorney of the City of Dallas, Texas, Plaintiffs, vs. Richard Joseph Haddad, Charles E. Carlock, Thomas Lynn Edmiston, Marlin Babb and Mateo Espindola, Defendants.	In the District Court Dallas County, Texas 68th Judicial District

Order Granting Temporary Injunction

On April 6 and 7, and on June 29 and 30th, 1978 the Court considered the application of Plaintiffs Henry Wade, District Attorney of Dallas County, and Lee E. Holt, City Attorney of the City of Dallas, for a temporary injunction pursuant to article 4667, Tex.Rev.Civ.Stat.Ann., after due notice to Defendants Charles E. Carlock and Thomas Lynn Edmiston, as ordered by the Court, and the Plaintiffs and Defendants Charles E. Carlock and Thomas Lynn Edmiston having appeared by and through their attorneys of record, and the Court having heard the evidence finds that Defendants Charles E. Carlock and Thomas Lynn Edmiston have engaged in the habitual use of, and have been parties to the use of, the premises or building or a part of a building located at 11128 Harry Hines Boulevard, Dallas, Dallas County, Texas, being further described as lot 10, block C/6521, in the City of Dallas, Dallas County, Texas, and being further described as:

That certain lot, tract or parcel of land, lying and being situated in the County of Dallas, State of Texas, more fully described as follows, to-wit:

BEING a tract of land out of the WM. MOONEYHAN SURVEY, ABSTRACT NO. 946, and more particularly described by metes and bounds as follows:

BEGINNING on the Northeast line of U. S. HIGHWAY NO. 77, 313.4 feet Southeast of the intersection of the Northeast line of U. S. HIGHWAY NO. 77, with the North line of a 22¾ acre tract;

* * * * * * * *

THENCE in a Northwesterly direction, parallel to the East line of U. S. HIGHWAY NO. 77, 50 feet to a point for corner;

THENCE in a Westerly direction, 135 feet to the PLACE OF BEGINNING, and being also known as a part of LOT 10 in BLOCK "C", according to an unrecorded Map of JACK LIVELY'S SUBDIVISION in said Survey,

for the commercial exhibition of obscene material on December 5, 1977, December 22, 1977, January 5, 1978, January 6, 1978, January 17, 1978 and January 18, 1978 by commercially exhibiting at that location certain motion picture films, each of which has as a whole a dominant theme that appeals to an interest of the average person in human sexual conduct that goes substantially beyond customary limits of candor in description or representation of such conduct, applying contemporary community standards; which films depict in a patently offensive way contact between the genitals of one person and the mouth or anus of another person, and contact between a human female sex organ and a human male sex organ, and patently offensive representations of human masturbation; and which films lack serious literary, artistic, political or scientific value.

The Court, having so found, and having considered the authorities and arguments of counsel, concludes that the habitual use of the hereinabove described premises for the commercial exhibition of obscene material constitutes a nuisance and that Plaintiffs are entitled to the temporary injunction prayed for.

It is therefore ordered that the temporary injunction prayed for be, and it is hereby, granted against Defendants Charles E. Carlock and Thomas Lynn Edmiston, their agents, employees and all persons acting in concert with them, and that the Clerk of this Court issue a writ of injunction, pending final hearing and determination of this cause, restraining and enjoining Defendants Charles E. Carlock and Thomas Lynn Edmiston, their agents, employees and all persons acting in concert with them, from commercially exhibiting within the premises or building or any part of a building located at 11128 Harry Hines Boulevard, Dallas, Dallas County, Texas, being further described as lot 10, block C/6521 in the City of Dallas, Dallas County, Texas, and being further described as:

> That certain lot, tract or parcel of land, lying and being situated in the County of Dallas, State of Texas, more fully described as follows, to-wit:
>
> BEING a tract of land out of the WM. MOONEYHAN SURVEY, ABSTRACT NO. 946, and more particularly described by metes and bounds as follows:

and:

* * * * * * * *

> All that certain lot, tract or parcel of land situated in Dallas County, Texas, to-wit:
>
> BEING a tract of land 50 feet by 135 feet, a part of the WM. MOONEYHAM SURVEY, ABSTRACT NO. 946 and more particularly described by metes and bounds as follows:

> BEGINNING on the Northeast Line of U.S. HIGHWAY NO. 77, 263.4 feet Southeast of the intersection of the Northeast Line of U.S. HIGHWAY NO. 77, with the North line of a 22¾ acre tract;
>
> THENCE Southeast, along the East line of U.S. HIGHWAY NO. 77, 50 feet to a point for corner;
>
> THENCE in a Northeasterly direction, 135 feet to a point for corner;
>
> THENCE in a Northwesterly direction, parallel to the East line of U.S. HIGHWAW NO. 77, 50 feet to a point for corner;
>
> THENCE in a Westerly direction, 135 feet to the PLACE OF BEGINNING, and being also known as a part of LOT 10 in BLOCK "C", according to an unrecorded Map of JACK LIVELY'S SUBDIVISION in said Survey,

any motion picture film which has as a whole a dominant theme that appeals to an interest of the average person in human sexual conduct that goes substantially beyond customary limits of candor and description or representation of such conduct, applying contemporary community standards; which film depicts or describes in a patently offensive way contact between any part of the genitals of one person and the mouth or anus of another person, or contact between a human female sex organ and a human male sex organ, or contact between a person's mouth or genitals and the anus or genitals of an animal or fowl, or patently offensive representations of human masturbation or human excretory functions; and which film lacks serious literary, artistic, political or scientific value.

Dated: June 30, 1978.

/s/ OWEN GILES
Judge, Presiding

0957B/jn

CLERK'S CERTIFICATE

THE STATE OF TEXAS }
COUNTY OF DALLAS }

I, BILL SHAW, Clerk of the District Courts of Dallas County, Texas, do hereby certify that the above and foregoing is a true and correct copy of ORDER GRANTING TEMPORARY INJUNCTION in Cause No. 78-2055-C, entitled HENRY WADE, ET AL. vs. RICHARD JOSEPH HADDAD, ET AL. as the same appears of record in my office in Vol. C-48, Page 417, Minutes of the District Court of Dallas County, for the 68th Judicial District of Texas.

GIVEN UNDER MY HAND AND SEAL of said Court, at office in Dallas, Texas, this the 3rd day of JULY, A.D. 1978.

BILL SHAW
Clerk of the District Courts,
Dallas County, Texas

By /s/ SUZANNE BUNGER
Deputy